



OIEC QUARTERLY REVIEW

July - September 2009 (Issue 15)

Letter from the Public Counsel



Dear Friends:

This season many of us have a sense of renewal, re-commitment, self-examination and other experiences associated with the beginning of a new year. We begin to prepare for the changing season and cooler temperatures. It is time to think about fall clothes and getting serious about football. We associate it with the beginning of a new school year and the start of the holiday season. This month is, in many ways, the beginning of a new year.

This time is the beginning of the fiscal year for state agencies and the effective date of many of the new laws passed by the Legislature. At the Office of Injured Employee Counsel (OIEC), there is a sense of new energy and new urgency. I have requested that all supervisory employees prepare a mission statement for themselves describing their goals within their area of responsibility and how they expect to accomplish them. The emphasis is not on organizational goals but their own individual goals.

Enhancing leadership skills by our supervisors has become a primary objective of senior management at OIEC. Through enhanced supervisory skills, those employees who make the wheels turn every day are invested with a sense of ownership in the success of our agency. Good management rolls down hill. Our good employees deserve nothing less than good leaders.

Sincerely,

Norman Darwin
Public Counsel

In This Issue

- 1 Letter from the Public Counsel
- 2 Sunset Advisory Commission Review
- 3 *Amicus Curiae* Brief Filed
- 4 Outreach Initiatives
- 4 Question of the Quarter
- 5 Ombudsman Program Audit
- 5 Early Intervention
- 5 Case Study: Lifetime Income Benefits
- 7 Practical Skills Training
- 8 Program Area Employee Spotlight

Contact Us

Office of Injured Employee Counsel

7551 Metro Center Drive
Suite 100, MS 50
Austin, TX 78744-1609

Phone: (512) 804-4170
Fax: (512) 804-4181

Injured Employee Toll-free
Number 1-866-393-6432
www.oiec.state.tx.us

Please provide feedback, ask questions, or send a request to be added to the Quarterly Review distribution list at OIECinbox@oiec.state.tx.us.

Sunset Advisory Commission Review



Sunset is the regular assessment of the continuing need for a state agency to exist and normally occurs every 12 years. OIEC's Sunset date was originally set for FY 2009, but was moved to FY 2011 as a result of the 80th Texas Legislature, 2007.

FY 2011 also corresponds with the Sunset date for Texas Department of Insurance and the Division of Workers' Compensation.

The Sunset date is the date on which an agency will be abolished unless legislation is passed to continue its functions. This creates a unique opportunity for the Legislature to look closely at each agency and make fundamental changes to an agency's mission or operations if needed.

OIEC began the Sunset Review process by developing and submitting a Self-Evaluation Report (SER) to the Sunset Advisory Commission on September 4, 2009. OIEC's SER provided extensive information about its programs and functions. It also identified problems, opportunities, and issues that the agency felt were important to be considered in the Sunset Review. Sunset staff will collect and evaluate information from extensive interviews of agency personnel, performance reports, operational data, and other sources. Sunset staff also solicits input from interest groups and professional organizations, and encourages public input and discussion of agency functions. Once the evaluation phase of the review is completed, Sunset staff members publish a report containing recommendations for statutory change by the Legislature and recommendations for agency management to implement to improve operations.

After publication of the Sunset staff report, the Sunset Advisory Commission conducts a public hearing on each agency under review. The public hearing provides an opportunity for Sunset staff to present its recommendations, for OIEC to formally respond to Sunset staff's recommendations, and for the public to comment on the report and raise additional policy issues relating to OIEC. This allows for broad public input into the Sunset process and begins the Sunset Advisory Commission's consideration of potential changes to recommend to the Legislature in the form of Sunset legislation.

Results of the Sunset legislation will impact OIEC as of September 1, 2011. OIEC's SER is available on its website at www.oiec.state.tx.us/resources/publications.html.

The Sunset Review of the Office of Injured Employee Counsel

The mission and performance of the Office of Injured Employee Counsel are currently being reviewed by the Legislature as required under the Texas Sunset Act. The Act provides that the Sunset Commission, composed of legislators and public members, periodically evaluate a state agency to determine if the agency is still needed, and what improvements are needed to ensure that state funds are well spent. Based on the recommendations of the Sunset Commission, the Texas Legislature ultimately decides whether an agency continues to operate into the future.

The Sunset review involves three steps. First, Sunset Commission staff will evaluate the Office of Injured Employee Counsel and, in April 2010, will issue a report recommending solutions to problems found. The Sunset Commission will then meet to hear public testimony on the agency and the recommendations of the Sunset staff. This meeting will likely be scheduled for May 2010.

Please refer to the Sunset Commission's website or call the office for updated meeting schedule information. Based on public input and the Sunset staff report, the Sunset Commission will adopt recommendations for the full Legislature to consider when it convenes in January 2011.

Through the Sunset review, every Texan has the opportunity to suggest ways in which the mission and operations of the Office can be strengthened. If you would like to share your ideas about the agency, you may send an email to the address below, use the comment form on the Sunset Commission website, or contact Chloe Lieberknecht of the Sunset staff.

Suggestions are preferred by Friday, December 18, 2009, so they can be fully considered by the Sunset staff.

Sunset Advisory Commission

P.O. Box 13066

Austin, Texas 78711

512/463-1300

Fax: 512/463-0705

Email: sunset@sunset.state.tx.us

Information about the Sunset process, including information on Sunset Commission meetings, can be found at: www.sunset.state.tx.us.



Amicus Curiae Brief Filed

LEORDEANU V. AMERICAN PROTECTION INSURANCE COMPANY



In July, OIEC filed an *amicus curiae* brief on Petition for Review in the case of *Liana Leordeanu v. American Protection Insurance Company* with the Supreme Court of Texas. (An *amicus curiae* brief is a brief filed with the court by someone that is not a party to the case who believes that the court's decision may affect its interest.) The central issue in the case was whether or not Ms. Leordeanu was in the course and scope of her employment when she was involved in a motor vehicle accident. Ms. Leordeanu was a pharmaceutical salesperson who worked exclusively from a home office which was provided by her employer. Additionally, the employer provided a vehicle and a storage unit which contained product samples and marketing materials. On March 21, 2003, Ms. Leordeanu traveled to doctors' offices in Austin and Bastrop and afterwards returned to Austin to conduct an event for a doctor and his staff at a local restaurant. Following that event, Ms. Leordeanu was driving to her storage unit to conduct further work, and then planned to drive home to complete some paperwork for her employer when she was involved in a motor vehicle accident.

In the Contested Case Hearing, Ms. Leordeanu's case hinged around the "dual purpose" doctrine. In her Statement of the Evidence, the Hearing Officer found that because the route taken to the storage unit was the same as the route home, Ms. Leordeanu had to satisfy both prongs of the "dual purpose" doctrine set out under § 401.011(12)(b) of the Texas Labor Code or be excluded from the course and scope of employment. The Hearing Officer found that since Ms. Leordeanu would have driven home via the same route whether or not she stopped at the storage unit, she did not satisfy the second prong of the "Dual Purpose" doctrine. The Appeals Panel also returned with an unfavorable decision for Ms. Leordeanu. Specifically, the Appeals Panel found that there was sufficient evidence to support the Hearing Officer's finding that the travel on March 21, 2003 would have been made had there been no affairs or business of the employer to be furthered by the travel.

In support of the Petition for Review of the *Leordeanu* case at the Supreme Court of Texas, OIEC argued that the decision of the Court of Appeals failed to correctly apply the "continuous coverage" doctrine to Ms. Leordeanu, who was injured while engaged in business travel. Additionally, OIEC argued that the Court of Appeals erred in finding that the *Leordeanu* case was a dual purpose case. OIEC believes that the manner in which the Court of Appeals applied the dual purpose doctrine would always remove the return portion of a business trip from the course and scope of employment in the sense that a claimant always has a personal interest in returning home. OIEC was strongly compelled to file an *amicus curiae* brief in this case because the misanalysis of the Court of Appeals would drastically reduce coverage for the growing class of employees who office from their homes and travel as an integral part of their work.

Although OIEC believes that the *Leordeanu* case is a continuous coverage case and not a dual purpose case, OIEC's *amicus curiae* brief also argued that the Petition for Review should be granted even if the Supreme Court finds that the *Leordeanu* case is a dual purpose case. This would resolve the conflict between the Third Court of Appeals and that of the Fourth Court of Appeals in *St. Paul Fire & Marine Ins. Co. v. Confer*—which has a long-standing interpretation of the dual purpose doctrine that runs contrary to the *Leordeanu* decision.

At present, the Petition for Review has been granted by the Supreme Court of Texas and briefings on the merits of the case are due from both parties in October 2009.



OIEC Outreach Initiatives

OIEC continues to focus on customer education with regard to workers' compensation and the services that OIEC offers. This quarter, those outreach efforts included presentations on Supplemental Income Benefits Changes, presentations at the Mexican Consulate's Labor Rights Week, and contact with the Texas Workforce Commission.

SUPPLEMENTAL INCOME BENEFITS. Each OIEC field office held an educational presentation in July for injured employees who may be eligible for Supplemental Income Benefits. The presentation's main focus was to provide information regarding the new changes in TDI-DWC's Supplemental Income Benefits rules.

There is a new form and application process for qualifying periods beginning on or after July 1, 2009. The presentation explains the new process, including the revised application and the number of mandatory weekly work search requirements for injured employees based on their county of residence.

The remaining monthly outreach presentations this year (October 30th, November 20th, and December 18th) will also cover the new Supplemental Income Benefits rules. The presentations are held in every OIEC Field Office and last approximately one hour.

LABOR RIGHTS WEEK. OIEC was invited to participate in the Mexican Consulate's "Labor Rights Week" in September which offered information on labor and safety related issues to Mexicans that visit the Consulate. It was a collaborative effort between the Government of Mexico; the United Food and Commercial Workers Union and other labor unions; faith-based groups; government agencies; immigrant advocates; and many others. They worked together to ensure that employees have adequate information about federal, state, and local labor laws and protections.

Labor Rights Week gave participants the opportunity to learn about the roles of government agencies and their rights as employees in the United States. More than 80 people attended OIEC's presentation about the agency and the services it offers.

It was a great opportunity to help potential customers learn practical information that will empower them to seek help and assert their rights in the workers' compensation system.

The remaining monthly outreach presentations this year (October 30th, November 20th, and December 18th) will cover the new Supplemental Income Benefits rules.

Question of the Quarter

Q: I have been receiving bills from my doctor for my workers' compensation injury. They are addressed to me and asking for payment from me. What should I do?

A: A healthcare provider may not bill a workers' compensation claimant for any part of the cost of healthcare services related to an on-the-job injury unless:

- a)** there has been a final adjudication that the injury is not compensable under workers' compensation law, or;
- b)** the claimant inappropriately selected the healthcare provider under the workers' compensation system, without the healthcare provider's knowledge, at the time he/she rendered services.

If neither of the two situations above are the case, you should contact your doctor make sure they know they should submit all bills related to treatment of your on-the-job injury to the insurance carrier.



A Successful Audit of the Ombudsman Program



OIEC's internal auditor recently completed a review of the Ombudsman Program. Overall the results of the audit were very favorable, although onsite reviews in four offices revealed a few areas in which compliance with internal established procedures could be improved.

A follow-up audit will be performed during the summer of 2010, and the Ombudsman Program has made it a priority to continue to improve compliance in all internal processes.

The internal auditor would like to thank the Ombudsmen and especially the Ombudsman Assistants in the field offices visited for their cooperation and assistance during the audit.

Early Intervention

Increased Experience and Training Leads to Increased Success

Customer Service Representatives have acquired a wealth of knowledge and experience during the two years OIEC has had its Customer Service Program. The level of success they are having with resolving disputes through the early intervention process reflects that knowledge and experience.

Customer Service recently reviewed disputes resolved during early intervention. The four Customer Service Representatives with the highest resolution rate resolved nearly 400 disputes between them during a seven month time period. This impressive number far surpassed the agency's expectations.

Customer Service Representatives have recently been promoted into the Ombudsman Program in Tyler and Midland to assist injured employees during the formal dispute resolution process.

It is evident though the high number of resolutions and the proven experience and skill level of the Customer Service Representatives that the Customer Service Program continues to have a positive impact on injured employees.

Case Study: Lifetime Income Benefits

In many cases, injured employees sustain serious work-related injuries but cannot qualify for Lifetime Income Benefits unless they have one of the specified conditions listed under Section 408.161(a). Whether or not an injured employee has one of the seven (7) qualifying conditions under Section 408.161(a) is an important first step to consider when evaluating a potential Lifetime Income Benefits candidate. Generally, an injured employee who, as a result of the compensable injury, has suffered a total and permanent loss of use of both feet at or above the ankles; both hands at or above the wrists; or one foot at or above the ankle and one hand at or above the wrist, is entitled to Lifetime Income Benefits pursuant to Section 408.161(a)(2), (3), or (4) and (b) (regarding "loss of use"). *Continued on page 6.*



Case Study (Continued)

In this case study, the claimant had sustained an injury to “both feet at or above the ankles” so he potentially had a qualifying condition provided he could establish loss of use. Once the Ombudsman had identified that the claimant was a potential Lifetime Income Benefits candidate, the Ombudsman set out to develop the medical evidence to prove that the condition of the feet at or above the ankles fell within the *Seabolt* test. A letter was sent to the treating doctor requesting a medical opinion to address:

- (1) the medical condition of both feet at or above the ankles;
- (2) the loss of functional use of both feet at or above the ankles; and
- (3) whether the condition of both feet at or above the ankles is such that it prevents the claimant from getting or keeping employment requiring the use of the feet.

Although the letter (tailored to the facts of claimant’s case) directed the treating doctor’s attention to the key aspects of Lifetime Income Benefits criteria, the treating doctor’s response was not very strong. The Ombudsman in this case presented the claimant with the option of going to a designated doctor. After the Ombudsman carefully explained the risks of getting a potential negative opinion from the designated doctor and having to overcome the presumptive weight of that opinion, the injured employee made an informed decision to request a designated doctor to evaluate his medical condition in the context of Lifetime Income Benefits.

In this case, the designated doctor issued a report and subsequent LOC response (addressing both carrier’s and claimant’s questions) in favor of the claimant. The carrier requested a post-designated doctor Required Medical Examination doctor, who also sided with the claimant. During this time, the Ombudsman had assisted the claimant in a Benefit Review Conference, and in scheduling a Contested Case Hearing. After much discussion, the carrier finally dropped its dispute and entered an agreement to pay Lifetime Income Benefits.

One of the most important matters in this case was for the Ombudsman to push for the date of injury as the accrual date; that is, the date when Lifetime Income Benefits payments were to have started. *Continued on page 7.*

The standard or test for “loss of use” is:

(1) whether the member no longer possesses any substantial utility as a member of the body (**medical prong** - severity of condition of qualifying condition causing loss of substantial function) **or**

(2) whether the condition of the injured member is such that it keeps the injured employee from getting and keeping employment requiring the use of the member (**employment prong**). See *Travelers Ins. Co. v. Seabolt*, 361 S.W.2d 204 (Tex. 1962).

This standard is disjunctive (either/or) so the injured employee does not need to prove both prongs of the test to establish entitlement to Lifetime Income Benefits. The injured employee needs only to prove one of the two prongs to establish entitlement to Lifetime Income Benefits. But remember that the total loss of use must be permanent.



Lifetime Income Benefits accrue and become payable on the date that the injured employee suffers from one of the conditions listed in Section 408.161(a), and not before. Once an injured employee is adjudicated eligible to receive Lifetime Income Benefits, Lifetime Income Benefits should be paid retroactively to the date the injured employee first became eligible.

Mid-Century Ins. Co. v. Texas Workers' Compensation Commission, 187 S.W. 3d 754 (Tex. App.—Austin 2006, no pet.).



Case Study (Continued)

In some instances, the injured employee's qualifying Lifetime Income Benefits condition may not occur until months or years after the date of injury because his or her compensable injury will have progressively worsened and developed over time (with the resulting condition being traceable to the compensable injury).

Section 408.161 provides as follows:

(a) Lifetime income benefits are paid until the death of the employee for:

- (1) total and permanent loss of sight in both eyes;
- (2) loss of both feet at or above the ankle;
- (3) loss of both hands at or above the wrist;
- (4) loss of one foot at or above the ankle and the loss of one hand at or above the wrist;
- (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg;
- (6) for a compensable injury that occurs on or after September 1, 1997, a physically traumatic injury to the brain resulting in incurable insanity or imbecility (for compensable injuries which occurred prior to September 1, 1997, there has to have been an actual injury to the skull which resulted in incurable insanity or imbecility); or
- (7) for a compensable injury that occurs on or after June 17, 2001, third degree burns that cover at least 40 percent of the body and require grafting, or third degree burns covering the majority of either both hands or one hand and face.

(b) For purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of the body part.

It is necessary to establish a causal connection between the loss of an injured member and the compensable injury. The claimant in this case happened to have a qualifying Lifetime Income Benefits condition which started on the date of injury, so Lifetime Income Benefits had accrued and were payable from the date of injury.

What is noteworthy about this case study (in addition to the accomplishment of getting the carrier to accept a Lifetime Income Benefits claim and resolve the issue by agreement) is that the injured employee had come to OIEC with a request for assistance on an extent dispute, and the injured employee left with an agreement that he was entitled to Lifetime Income Benefits. The Ombudsman in this case took the initiative in identifying a potential Lifetime Income Benefits candidate and informed the injured employee of his rights and what benefits he could qualify for under workers' compensation laws. The Ombudsman was proactive in developing the case and enlisted Regional Staff Attorney assistance at every step of the process. This case provides an excellent example of the positive consequences of early collaboration between the Ombudsman and the Regional Staff Attorney. Indeed, in this instance, the results were likely life-changing for the injured employee.

Practical Skills Training: Electronic Database Searching

In order to ensure that Ombudsmen have the ability to access the latest evidence-based medicine, OIEC has partnered with the National Network of Libraries of Medicine, South Central Region (NN/LM SCR) to arrange training sessions in electronic medical database searching. *Continued on page 8.*



Practical Skills Training (Continued)

These initial training sessions will focus on research strategies and the PubMed database. PubMed is a service of the U.S. National Library of Medicine that includes over 19 million citations from MEDLINE and other life science journals for biomedical articles dating back to 1948. PubMed includes links to full text articles and other related resources. See <http://www.pubmed.gov>.

The Legal Services Division has coordinated training sessions at regional libraries throughout the state. Ombudsmen will receive training at one of the following medical libraries:



- University of North Texas Health Science Center, Ft. Worth
- Texas Academy of Medicine-Texas Medical Center Library, Houston
- Regional Academic Health Center, Harlingen
- University of Texas Health Science Center at San Antonio
- UT Southwestern Medical Center Library
- Texas Tech University Health Sciences Center El Paso
- Texas Tech University Health Sciences Center Permian Basin
- Texas Tech University Health Sciences Center Lubbock

The training is part of the ongoing Practical Skills Training Series. Several Practical Skills Training sessions are provided each year to develop and refine the skills that the Ombudsmen use in assisting injured employees in the dispute resolution process.

Health care reasonably required: Under House Bill 7, Section 401.001 of the Labor Code now defines it as that which is clinically appropriate and considered effective for the employee's injury in accordance with evidence-based medicine or practice standards recognized in the medical community.

Evidenced-based medicine: Defined as the use of current best quality scientific and medical evidence formulated from credible scientific studies, including peer-reviewed medical literature and treatment and practice guidelines.

Program Area Employee Spotlight

Sharon Holley, Administration and Operations, Quality Assurance Specialist

OIEC has a very specific and important mission: to assist, educate, and advocate on behalf of the injured employees of Texas. OIEC has four program areas responsible for different but equally important responsibilities to accomplish this mission: Customer Service, Ombudsman Program, Legal Services, and Administration and Operations. Each issue, the OIEC Quarterly Review will focus on a different program to further explain what that program does, more specifically highlighting one of the employees in that program and how they have contributed to the mission of the agency.

The Quality Assurance Section, a section within Administration and Operations, was created in June 2009. The Quality Assurance Section is responsible for ensuring OIEC's customers receive consistent information, identifying areas that can be improved upon as an agency, and developing solutions that increase operational efficiency. *Continued on page 9.*



Program Area Employee Spotlight (Continued)

One of the new Quality Assurance Specialists is Sharon Holley. She brings a unique skill set to her new position in that she was an Ombudsman for over a decade. Sharon has strong advocacy skills and was a superior Ombudsman.

Sharon has a positive energy about her and she approaches her work with that same energy. A graduate of Tyler Jr. College with a degree in Computer Science/Business, Sharon has an analytical mind that is able to tackle the complexities of workers' compensation processes and issues.

Sharon's experience in workers' compensation spans nearly twenty years. Prior to her work as an Ombudsman, Sharon worked for a claimant's attorney for six years, handling all aspects of workers' compensation claims. She then joined TDI-DWC (formerly the Texas Workers' Compensation Commission) as an Ombudsman in the Tyler Field Office, and was transferred to OIEC in 2006 when OIEC was created.

An exemplary Ombudsman, she most recently served as the Ombudsman Team Lead for the Tyler Field Office. Her knowledge, experience, and calm demeanor have made her a natural choice as a training mentor for Ombudsmen and Customer Service Representatives alike. She is also a gifted presenter and has spoken at many TDI-DWC and OIEC outreach presentations to educate customers about workers' compensation.

Sharon has a good balance of work and personal life. She has been married to her husband for 26 years and has three grown sons and two young grandchildren. Her hobbies are gardening, reading, and crocheting. She is very interested in genealogy research and has traveled extensively for that purpose.

When asked what she hopes her experience will add to the new Quality Assurance Section, Sharon said, "I hope to bring all aspects of my experience to the Quality Assurance Team. I believe we can enhance OIEC services by working with my team members to streamline the processes and providing training where needed. I want to ensure OIEC continues to achieve quality in all areas by identifying potential areas of concern and taking the necessary steps to correct them so they can be avoided in the future. The goal is to make the experience for the injured employees as positive as possible and to ensure that OIEC employees are properly trained to provide consistent assistance to injured employees across the State. I will work to make the entire process as smooth as possible for the injured employees of Texas."

The Quality Assurance Section may be a new one for OIEC, but Sharon's experience and dedication are certain to benefit the program and ensure that it has a positive impact on the agency's mission.

